

May 12, 1999

Can Public Schools Use Religious Speech To Memorialize Their Victims of Violence?

Senator Wayne Allard represents the State where Dave Sanders recently gave his life to save his students. Dave Sanders is, as much of the world now knows, the teacher at Columbine High School who was shot down while warning his students of the mortal danger that was stalking their halls. Twelve students were murdered at Columbine, but Dave Sanders is credited with keeping the death toll from rising far higher. Mr. Sanders was shot in the chest and bled to death as his students vainly tried to save him. Having saved so many of his students, his last words were for his own children, "Tell my girls I love them." He is survived by his wife, three daughters, and 10 grandchildren.

What can be done at Columbine High to honor their American hero? For example, would it be constitutionally permissible for students, family, and friends to erect on the grounds of Columbine High School a marble marker inscribed as shown below? And, would it be constitutionally permissible to dedicate the marker with an appropriate service that included prayers and inspiring religious music?

"DAVE" SANDERS
FATHER, TEACHER, COACH, HERO
1951 - 1999
GREATER LOVE HATH NO MAN THAN THIS,
THAT HE LAY DOWN HIS LIFE FOR HIS FRIENDS
(ST. JOHN 15:13)

These are not idle questions. Lawsuits might very well be brought, and — judging from past cases dealing with religious expression in public school — there is a fair risk that the plaintiffs might prevail. The risk that the *threat* of a lawsuit will deter a proper and fitting memorial is, however, extremely high.

In 1992, the Supreme Court held that it was a violation of the Constitution for a public high school to invite a clergyman to give a nondenominational prayer at its graduation services. *Lee v. Weisman*, 505 U.S. 577. Today, that 1992 decision and its antecedents are being used to forbid prayers at high school football games. In 1980, the Supreme Court held unconstitutional a statute requiring that a copy of the Ten Commandments (purchased with private contributions) be posted on the wall of each public school classroom. *Stone v. Graham*, 449 U.S. 39 (1980). These cases and others show that the legal threat is real. Senate Allard proposes to address that threat:

Senator Allard's amendments to the juvenile justice bill (S. 254) would put the Congress of the United States on record affirming the constitutionality of using religious speech on a permanent memorial or in a memorial service. Of course, the Allard amendments would *not* put Congress on record with respect to the kind of memorial that would be appropriate — that decision is for Colorado and the community of Columbine High. The Allard amendments do, however, declare that a fitting memorial may contain religious speech without violating the Constitution.

The first Allard amendment says that Congress *finds* that the design and construction of a memorial that is placed on the campus of a public school in order to honor the memory of any person slain on that campus may use religious symbols, motifs, or sayings without violating the First Amendment.

The second Allard amendment is similar to the first; it says that Congress *finds* that the saying of a prayer, the reading of a scripture, or the performance of religious music at a memorial service that is held on the campus of a public school in order to honor the memory of any person slain on that campus does not violate the First Amendment to the Constitution.

The Allard amendments are, of course, broad enough to reach other memorials, for example for the murdered students. Dave Sanders was not the only hero murdered that day at Columbine. Nor are the Allard amendments limited to the Colorado tragedy; they encompass every case in which a person is slain on the campus of a public school and where the community desires to hold a memorial service or erect a permanent memorial on the grounds of that school. In either case, the Congress declares that religious speech can be used to memorialize the lives that were taken.

Congress Is, After All, a Co-Equal Branch

The Allard amendments provide an opportunity for Congress to express an opinion on the Constitution. The *finding* in the amendments is not binding law. If lawsuits are filed, they will be settled by courts, not Congress. However, Congress is a co-equal branch of the National Government, and it is bound by the same Constitution that binds the courts. Congress is entitled to interpret the Constitution, just as the other two branches do. [See, *e.g.*, the important article by Neal Devins & Louis Fisher, "Judicial Exclusivity and Political Instability," 84 *Virginia Law Review* 83 (1998).]

With the Allard amendments, Congress is interpreting the First Amendment consistent with the best traditions of the American Republic and the good sense of the American people. If the people of Colorado believe that religious speech is necessary to memorialize the heroism and tragedy at Columbine High School, then let them express themselves with the most profound and permanent expressions of the human heart.

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[In addition to the stated, formal "finding" of the Congress of the United States which is discussed in this paper, each Allard amendment also declares that, if a lawsuit is filed challenging the constitutionality of a memorial, the Attorney General of the United States may provide legal assistance to the school district or other agency that is defending the legality of the memorial, and each party to the lawsuit will pay its own attorney's fees and costs.]